United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1334

To be argued by
FREDERICK T. DAVIS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1334

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHARLES S. CHRISTOPHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

FREDERICK T. DAVIS,
Assistant United States Attorney,
Of Counsel.

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Docket No. 76-1334

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Charles S. Christopher appeals from a judgment of conviction entered on June 29, 1976, in the United States District Court for the Southern District of New York, after a plea of guilty before the Honorable Thomas P. Griesa, United States District Judge.

Indictment 75 Cr. 854, filed on August 27, 1975, in seven counts, charged Charles S. Christopher and Richard Geyer in Count One with conspiracy to violate the laws of the United States, in violation of Title 18, United States Code, Section 371; in Counts Two through Seven, it charged the defendants, individually, with various substantive violations of the laws relating to surreptitious eavesdropping of conversations using electronic devices, in violation of Title 18, United States Code, Section 2511. Christopher was the sole defendant in Counts Two and

Five; Geyer was named in Counts Three, Four, Six, and Seven.*

Prior to trial, Christopher moved to suppress as evidence against him certain objects found in the search of a hotel room belonging to the co-defendant Geyer on March 18, 1975. In an oral opinion delivered on April 27, 1976, Judge Griesa denied these motions. (App. 41-45).** Immediately following the denial of these motions, Christopher pleaded guilty to Count Five of the indictment, with the express stipulation that he be able to appeal to this Court the District Court's denial of his motion to suppress. (App. 48).***

On June 29, 1976, Christopher was sentenced to two years probation and a $10,000 fine. The fine has already been paid.****

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* In particular, Count Two charged Christopher with procuring another person to intercept oral communications of others. in violation of 18 U.S.C. § 2511(1)(a); Counts Three and Four charged Geyer with endeavoring to intercept oral communications at, respectively, the Plaza Hotel and the Chemical Bank, in violation of 18 U.S.C. § 2511(1)(a). Counts Five, Six and Seven charged, respectively, the same acts charged in Counts Two through Four, but claimed a different jurisdictional basis in that the acts were alleged to have interfered with interstate commerce, in violation of 18 U.S.C. § 2511(1)(b)(ii), (iv)(A) and (iv)(B).

** Citations to "App." refer to the separate appendix filed by Christopher; citations to "Br." refer to Christopher's Brief.

*** The Court has authorized this procedure. *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States* v. *Pond*, 523 F.2d 210, 212 (2d Cir. 1975); *United States* v. *Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

**** On the same date, Geyer, who had also pleaded guilty on April 27, 1976, was sentenced to two years of probation. The notice of appeal initially filed by Geyer in this case was subsequently withdrawn.

Statement of Facts

A. The search and its fruits.*

On March 16, 1975, Charles S. Christopher, then president and chairman of the board of Surety Industries, Inc., in Dallas, Texas, telephoned Richard Geyer, a private detective specializing in the sale and use of surreptitious listening devices. In the course of that conversation and in later conversations, Christopher asked Geyer to use available equipment to determine the content of various meetings of his chief competitor and of others who were working with his competitor. In particular, Christopher told Geyer of a meeting that was to be held in a Chemical Bank branch in New York City in the afternoon of March 18, 1975. Apparently unknown to Christopher, Geyer recorded on cassette tape his March 16 conversation with Christopher, as well as scores of other telephone conversations he had on that and other days with other individuals. On March 17, 1975, Geyer flew from his home in Florida to New York City, where he registered in Room 1332 of the Plaza Hotel. Christopher separately flew from Dallas, Texas, to New York and registered in another room on another floor of the same hotel.

During the morning of March 18, 1975, a manufacturer of listening devices who had previously provided information to the office of the United States Attorney (hereinafter referred to as the informant) received a telephone call from Richard Geyer asking to buy two transmitting devices. The informant went to Room 1332

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* This portion of the statement of facts is based in large part upon the affidavit filed in support of the warrant to search Room 1332 of the Plaza Hotel, as well as other affidavits (App. 21, 24) filed by participants of the search concerning the search. No contrary proof or offer of proof was ever made by Christopher, and, indeed, his brief adopts essentially the same statement of facts.

of the Plaza Hotel in the middle of that morning, and sold two transmitters to Geyer. Geyer—who was in the presence of one Dale Tolbert *—told the informant that he needed the transmitters to "bug" a conference room. While the informant was in the room, he noticed that a radio receiver in the room was receiving "feedback"; Geyer stated that he was attempting to monitor conversations in the next room, Room 1334.** (App. 20).

Immediately after he left the Plaza Hotel, the informant telephoned John Buckley, a criminal investigator in the office of the United States Attorney, and related to him these events. Based on the informant's statements, Buckley sought and procured from a United States Magistrate in the Southern District of New York a search warrant for Room 1332 of the Plaza Hotel during the afternoon of March 18. (App. 17-20).

Also during the afternoon, several special agents of the Federal Bureau of Investigation—alerted by Buckley—kept watch on Room 1332 at the Plaza Hotel. At approximately 5:30, they were informed that a search warrant had issued for the search of Room 1332. Shortly thereafter, they saw Tolbert leave and then re-enter that room. They arrested Tolbert at 5:59 P.M. in the open doorway of Room 1332, in which they saw Geyer. Geyer was also immediately arrested in the room. At that point the agents did not touch anything in the room nor search it, other than to open closet doors to be sure that no confederates were hiding. The agents then inter-

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* Subsequent investigation indicated that Tolbert was an employee of Christopher's company. (App. 16).

** Subsequent investigation showed that the occupant of Room 1334 was one Peter Nottage, an insurance broker who was scheduled to attend the Chemical Bank meeting with Christopher's competitor in the afternoon of March 18. (App. 16).

viewed both Tolbert and Geyer. During the interview procedure, the warrant issued by the Southern District magistrate was delivered to them in the room. Subsequently, the agents thoroughly searched the room. In it they found, *inter alia*, an electronic listening device attached to the wall adjoining Room 1334; two cassette tapes of telephone conversations of Geyer, including the March 16 conversation between Geyer and Christopher described above; and several pieces of paper describing the Chemical Bank conference room at which Christopher's competitors were meeting that afternoon,* as well as other information. (App. 24-26).

B. Pre-trial proceedings.

Prior to trial, Christopher made numerous motions with respect to the case. Included among these was a motion (App. 4-6) to suppress "all items seized during the search of Room 1332 of the Plaza Hotel" on March 18, 1975. As bases for this motion, Christopher claimed, *inter alia*, that "contained in the items seized during the search of said Room 1332 are items which are the property of the Defendant, Charles S. Christopher"; that the affidavit in support of the search warrant contained false statements; and that the warrant was defective for other procedural reasons. No affidavit accompanied the motion, although a memorandum of law was subsequently filed. Although the motion contained the statement of ownership quoted above, no such statement was ever made—under oath or otherwise—by any person with knowledge, nor was it ever specified which "items" were the property of Mr. Christopher. The co-defendant Richard Geyer similarly moved to suppress the same evidence. While his motion was accompanied by an

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* A search of that conference room subsequently revealed another listening device.

affidavit of his attorney, Henry Putzel, III, that affidavit made no mention of Christopher's ownership *vel non* of any of the items seized. (App. 9-14).

C. The trial court's ruling.

On the morning when trial was scheduled to begin, after the defendants had made known their intention to plead guilty, Judge Griesa denied the motions to suppress—as well as other motions made prior to trial date—noting, in particular, that Christopher had no standing to contest the search of Room 1332 of the Plaza Hotel. (App. 43). At that point neither Christopher nor his attorneys made any further offer of proof concerning Christopher's connection, if any, with the items seized.

ARGUMENT

POINT I

Christopher has no standing to contest the legality of the search of his co-defendant's hotel room.

In the District Court, the Government conceded that Richard Geyer, who was registered to and an occupant of the room searched by the FBI agents on March 18, had standing to contest the search of Room 1332. See *United States* v. *Jeffers*, 342 U.S. 48 (1951); *United States* v. *Birrell*, 470 F.2d 113, 116 (2d Cir. 1972). It consistently contended that Christopher had no such standing. The District Court's conclusion that Christopher had not demonstrated standing was entirely correct.

The Supreme Court has admonished that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were vio-

lated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States*, 394 U.S. 165, 171-172 (1969). Thus, the mere fact that the evidence seized from the hotel room of a co-defendant might have been introduced at trial against Christopher is utterly irrelevant unless he has shown that *his* Fourth Amendment rights were violated by the seizure. This he has totally failed to do. As Christopher concedes, he was not present in the hotel room at the time of the seizure, nor was the hotel room registered to or occupied by him. (App. 30).

In *United States* v. *Brown*, 411 U.S. 223 (1973), the Supreme Court noted that defendants do not have standing to raise fourth amendment issues if they "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." 411 U.S. at 229. Christopher self-evidently fails to meet any of these tests. See also *United States* v. *Tortorello*, 533 F.2d 809, 813 (2d Cir. 1976).

Christopher attempts to evade the obvious force of this by raising several novel arguments, each of which is totally without basis in either fact or law. First, he asserts that even though he was not present at, nor had an interest in, the premises searched, he had some sort of possessory interest in some of the things seized, and thus he can complain of their seizure. This claim is utterly meritless. It should be noted that Christopher *never* asserted—by means of affidavit or sworn statement,

or any other means *—that he owned or had any actual interest in any of the items seized in Room 1332.** Indeed, even before this Court, Christopher has yet to state what possessory interest he had in the items, or even to identify which of the scores of items found in Room 1332 he claims were his, apparently leaving it to the Government or this Court to guess.

Christopher further argues that while under normal circumstances "it would be incumbent on him to assert an interest in the property seized by the Government," in this case that requirement is satisfied since the Government "was conducting handwriting analysis on items seized in Room 1332 in preparation for introducing such

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* In *Simmons* v. *United States*, 390 U.S. 377, 391 (1968), the Supreme Court noted that "[t]he only, or at least the most natural, way in which the defendant could be found standing to object to the admission of [certain evidence] was to testify that he was the owner." See also *Jones* v. *United States*, 362 U.S. 257, 261 (1960). The record is also entirely clear that Christopher's failure to allege an interest in any of the items seized was neither an oversight nor a technicality. At a pre-trial conference in this matter held before the filing of Christopher's motion to suppress, the Government made explicit its position that Christopher had no standing to contest the seizure. (App. 30). Christopher was thus fully on notice of his legal burden to allege standing. The Government's position was reiterated in a letter sent prior to the decision on the motions that virtually begged Christopher to allege whatever facts supported his standing. (App. 36).

** The mere conclusory allegation in the motion filed by Christopher's attorney that certain of the seized items "are the property of the Defendant, Charles S. Christopher," does not, of course, suffice to meet Christopher's burden of establishing standing. Since it did not allege any facts based upon "personal knowledge," it could not be considered in meeting this burden. See *United States* v. *Armedo-Sarmiento*, — F.2d —, Dkt. No. 76-1113, slip op. 305, 324 (2d Cir., Oct. 28, 1976); *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967).

evidence against Mr. Christopher." (Br. at 7).* This argument totally ignores the nature and the requirements of the so-called "automatic standing" doctrine. That doctrine was designed to deal with the "dilemma," *Connolly* v. *Medalie*, 58 F.2d 629, 630 (2d Cir. 1932) (L. Hand, *J.*), of forcing a defendant to assert that a seized object was his, and then using the assertion as an admission against him at trial. In *Jones* v. *United States*, 362 U.S. 257, 261 (1960), the Supreme Court held that where a defendant would have to admit his guilt in order to claim standing, standing would be presumed. However, in the light of *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that a statement made to secure a Fourth Amendment right could not be used against a defendant at trial, the Court in *Brown* v. *United States*, *supra*, specifically limited the automatic standing principle to cases where the offense "includes, as an *essential element* of the offense charged, possession of the seized evidence *at the time of the contested search and seizure*." 411 U.S. at 229 (emphasis added). Since Christopher was not charged with a possessory crime at all, and in particular was certainly not charged with possessing anything in Room 1332 at the time of its seizure, this doctrine is totally inapplicable to him. Thus, Christopher simply cannot urge this Court to infer standing from any activity of, or position taken by, the Government. Having failed—despite an explicit prior eluci-

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* In addition to being legally insufficient, this claim is also factually misleading. First, the Government never admitted that the purpose of conducting handwriting analysis was to prove Christopher's ownership, for the simple reason that the documents would be admissible irrespective of Christopher's connection with them. Second, the handwriting analysis made of the documents—all of which were made available to defense counsel pursuant to Rule 16 of the Federal Rules of Criminal Procedure—did not reveal Christopher to be the author of any of the documents, nor did Christopher's fingerprints appear on anything seized.

dation of the Government's position in this regard—to allege "that he himself was the victim of an invasion of privacy," *Jones* v. *United States, supra*, 362 U.S. at 261, Christopher's claim must fail.*

In Christopher's final effort to persuade this Court that he had standing even without demonstrating it,** he argues that since a tape recording of Christopher's voice was among the items seized, he has standing to contest the legality of its seizure. In particular, he claims that "the seizure of a recording of a conversation of Mr. Christopher is equivalent to a direct wiretap placed by the Government which produces a seizure of the conversation."

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* It should be noted that even if Christopher were now to claim that he wrote some of the documents or had some interest in the objects found in the room, it would not follow that he would have standing to contest the search unless it were shown that he had an actual expectation of privacy in those objects. See *United States* v. *Pui Kam Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). In a case remarkably similar to this one, *United States* v. *Hunt*, 505 F.2d 931 (5th Cir. 1974), the Fifth Circuit considered the claim of a person who had hired private detectives to surreptitiously monitor the conversations of others that eavesdropping paraphernalia found on the detectives at the time of a search of them should be suppressed. The Court held that even though the defendant technically owned the monitoring paraphernalia, he did not have a sufficient interest in them to support standing to contest the seizure of the objects from others. In the absence of any statement of Christopher's connection (if any) with the items seized (or some of them), the record is absolutely barren of the kind of interest in the seized objects that would support Christopher's claims.

** The law is clear that the burden of proof is on the defendant to demonstrate standing. "[I]t is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Jones* v. *United States, supra*, 362 U.S. at 261. See also *United States* v. *Brown, supra*, 411 U.S. at 229.

(Br. at 9). This argument is simply absurd. The "seizure" of the conversation was made several days prior to the search by the FBI agents, and was conducted by a private individual (Geyer) in the furtherance of his conspiracy with Christopher. To claim that Geyer was somehow the agent of the Government in recording the conversation ignores not only the fact that Geyer consented to the recording of the conversation—thus rendering it entirely legal, *United States* v. *White*, 401 U.S. 745 (1971)—but also that Geyer was acting in an entirely private capacity. Since it is axiomatic that a defendant cannot complain of a search committed by a private party, see *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *Blum*, 329 F.2d 49 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964); *United States* v. *Capra*, 501 F.2d 267, 272 and n.4 (2d Cir. 1974), it follows that Christopher cannot complain of the legality of the recording.*

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* His apparent further argument that even if he cannot complain of the recording, he nonetheless has standing to complain of the seizure of the tape fails for two reasons. First, it is apparent from the context of the situation that Christopher was totally unaware that Geyer recorded their conversation. Thus, he had no "expectation of privacy," *Katz* v. *United States*, 389 U.S. 347 (1968); *United States* v. *Pui Kam Lam*, *supra*, with respect to it, and certainly no expectation that the *Government* would not seize it. Second, since Christopher concededly had no standing to search the premises of Room 1332, he had at most standing to complain of the *seizure* of the tape recording, but not the *search* that led to it. This distinction was explored by Judge, now Justice, Stevens in *United States* v. *Lisk*, 522 F.2d 228, 230 (7th Cir. 1975), in the following terms:

> "There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence." 522 F.2d at 230.

Since the object of Christopher's motion was not the return of the tape recording but its suppression as evidence against him, it follows that his claim is meritless.

POINT II

The search warrant was entirely proper; the District Court acted correctly in declining to hold a hearing.

In Points II and III of his brief, Christopher argues that alleged false statements in the search warrant rendered invalid the search of Room 1332 of the Plaza Hotel or, alternatively, that the District Court should have held a hearing to test the merits of these claims.* We submit that Christopher has not even demonstrated standing to raise these claims; at any rate, the arguments are frivolous.

As this Court has frequently noted, a defendant is entitled to a hearing to test the legality of a search based upon a warrant only when he has made an "initial showing of falsehood or other imposition on the magistrate." *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); *United States* v. *Steinberg*, 525 F.2d 1126, 1130-31 (2d Cir. 1975). Furthermore, the "falsehood" must be both "knowing" and "material" to the issuance of the warrant, see *United States* v. *Gonzalez*, 488 F.2d 833, 837 (2d Cir. 1973); Kipperman, *Inaccurate Search Warrant Affidavits as Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825 (1971). Christopher has obviously failed to meet this burden.

The sole claim of error that he alleges existed in the affidavit is the statement at one point in the affidavit that while the informant was "in" Room 1334 he overheard

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* Christopher has not claimed—nor could he—that the information contained in the affidavit in support of the search warrant was insufficient to establisl probable cause.

feedback on the radio used by Geyer.* Since the affidavit clearly establishes that the radio, Geyer and the informant were all at all times in Room 1332, this statement was clearly a one-digit error of a typographical nature that clearly could not have misled the magistrate to erroneously conclude that probable cause existed to issue the warrant, and most certainly could not have been intended to mislead the magistrate. The entire context of the affidavit demonstrates that the informant entered Room 1332 and held his conversation with Geyer in that room. It was also clear that Room 1334 was the room next door in which the conversations that Geyer was attempting to overhear took place. From this it is obvious that the informant was never "in" Room 1334, and the magistrate simply could not have read the affidavit to mean this. That the

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* The pertinent portion of the affidavit was as follows:
"Informant advised affiant that on March 18, 1975, he was telephonically contacted by Richard Guyer [sic] at approximately 10:00 A.M. Guyer [sic] asked the informant to secure several electronic transmitters and to bring them to Room 1322, Plaza Hotel, 59th Street and Fifth Avenue, New York, N.Y. The informant brought two transmitters to Room 1332. When he arrived in Room 1332, at approximately 10:45 A.M., Richard Geyer and an unidentified male were present. Informant gave two transmitters to Geyer. On a table in Room 1332 the informant observed a Panasonic RF 888 Radio Receiver. At this time Geyer stated to the informant that Geyer and the unidentified male were in the process of endeavoring to intercept the oral communications in Room 1334, which is adjacent to Room 1332. While present in Room 1334, the informant heard "feedback" through the Panasonic radio-receiver situated on the table in Room 1332 indicating that an electronic, mechanical or other device designed to intercept communications, was already in place and operating. Informant stated that the "feedback" was coming through the receiver from Room 1334. Geyer stated to informant that Geyer needed the transmitters, which informant had brought, to use in placing a bug in an unidentified conference room." (App. 19-20).

misstatement was unintentional and without effect is further demonstrated by the fact that in his motion in the District Court Christopher never even attempted to demonstrate or even argue that the mistake could have had any effect on the magistrate.* In his brief to this Court, Christopher now argues that the "use of Room 1334 in the affidavit in two separate sentences ** makes the affidavit read as if the information had gone into Room 1334 and made a determination from there that electronic monitoring equipment was prepared to monitor conversations from Room 1332." (Brief at 19). This claim is utterly untenable. The affidavit itself explicitly states that the informant brought the transmitters to Geyer in Room 1332, and that that room was where all the ensuing transactions took place. In short, the misstatement could only have been considered as "negligent," *United States* v. *Pond*, 523 F.2d 210 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975); *United States* v. *Faruolo*, 506 F.2d 490, 493 (2d Cir. 1974); *United States* v. *Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972), and could not have affected the Magistrate's determination—which is not itself attacked on this appeal—that there was probable cause to search the room. Since it is necessary that the defendant demonstrate that the magistrate could not have found probable cause absent the false statement, see *United States* v. *Pond*, *supra*; *United States* v. *La Vecchia*, 513 F.2d 1210, 1215 (2d Cir. 1975), Christopher's claim fails.

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* Co-defendant Geyer, who concededly had standing to raise this point, never even bothered to do so.

** This statement is itself misleading. While the affidavit did refer to Room 1334 on three occasions, two of those are concededly correct—that is, the identification of Room 1334 as the room where the conversations to be overheard took place. Thus, it is clear that there was only a single mistaken reference to Room 1334.

Christopher also argues that since his co-defendant filed an affidavit in support of his motion to suppress that differed from the affidavits filed by the Government, a hearing should have been held to resolve the question of fact. (Br. at 12). This argument ignores two critical factors. First, the affidavit filed by Geyer's attorney was not directed to the validity of the search warrant but rather to the procedures adopted by the agents that would demonstrate the legality *vel non* of the search even absent a search warrant.* They thus clearly raise no issue of fact on any issue raised on this appeal by Christopher. Second, the affidavit itself was entirely conclusory and never specified the basis for the affiant's knowledge.** Since it did not purport to be based upon personal knowledge, it did not sufficiently raise an issue of fact to require a hearing. *United States* v. *Gillette*, *supra*, 383 F.2d at 848.

Finally, for the first time on appeal, Christopher claims that since the warrant was mistakenly directed to Room 1334 rather than to Room 1332, the search based on that warrant was illegal. Since this argument was never raised in the District Court by either party, it cannot be raised on appeal.*** This Court has consistently construed the requirement of Rule 12(b)(3) of the Federal Rules of

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* The Government argued, for example, that even if the warrant were invalid, the search of the room was nonetheless valid as incident to a lawful arrest and because the items seized were in plain view.

** The Putzel affidavit was the only affidavit filed by any defendant in the District Court. Neither Christopher nor Geyer filed affidavits of their own.

*** Indeed, this Court is without appellate jurisdiction to consider this point. When Christopher pleaded guilty, he did so on the stipulation that he retain the right "to appeal the denial of the motions that [he has] made." (App. 48). He did not retain—nor did the Government consent to—the right to raise new issues on appeal.

Criminal Procedure that suppression motions be made prior to trial to bar a defendant from raising a new suppression issue on appeal for the first time. *United States* v. *Armedo-Sarmiento*, — F.2d —, Dkt. No. 76-1113, slip op. 305, 324 (Oct. 28, 1976); *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976) (and cases there cited); *United States* v. *Sisca*, 503 F.2d 1337, 1347-48 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). At any rate, the claim is meritless. From the affidavit of the attesting officer it must have been clear that the room containing the objects to be seized was Room 1332, not Room 1334—indeed, Room 1334 was the room occupied by innocent victims where the conversations to be overheard were taking place. Since the officers thus "clearly knew which apartment they were to search," the misstatement did not vitiate the validity of the warrant. *United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975). See also *Steel* v. *United States*, 267 U.S. 498 (1925). It follows that the search was valid.*

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* As an alternative ground supporting the validity of the search, the Government argued in the District Court that even if the warrant were invalid, the search was nonetheless valid as incident to Geyer and Tolbert's arrest and since the objects were in plain view. See *United States* v. *Montiell*, 526 F.2d 1008 (2d Cir. 1975); *United States* v. *Lam Muk Chiu*, 522 F.2d 330 (2d Cir. 1975). This Court need not reach these arguments.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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FREDERICK T. DAVIS,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—734

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8 day of Nov. 1976 he served ~~a~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Frank S Wright Esq
Main Tower Bldg
1200 Main Street
Dallas, Texas 75202

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

F. T. Davis

Sworn to before me this

8 day of Nov. 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977